No. 80-1669

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ALEXANDER L. STEVAS
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

FRANK E. MOSS,

Petitioner

v.

G. ANDREW LAWRENCE,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the protections accorded to media defendants in libel and slander actions by the First Amendment to the Constitution of the United States extend also to a non-media defendant who is a candidate for public office and who utters a slanderous statement regarding one of the supporters of his political opponent?

2. Whether a professional political consultant who is paid by or on behalf of a candidate for public office to advise the candidate regarding political polling, strategy, voter targeting, volunteer organization, advertising, writing, fund raising and general campaign management, but who did not himself seek or attain public prominence as a result of these activities, is a "public figure" whose defamation is constitutionally protected absent "actual malice"?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Respondent, G. Andrew Lawrence, opposes the Petition of Frank E. Moss for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review the judgment of that Court entered in the above entitled case on January 13 1981.

CITATIONS TO OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is published at 639 F2d 634.

The Memorandum Opinion of the United States District Court for the District of Utah has not yet been published,

but is printed as Appendix B to the Petition for Writ of Certiorari.

JURISDICTION

The Judgment of the United States Court of Appeals for the Tenth Circuit was entered January 13, 1981. The Petition for Writ of Certiorari was docketed in this Court on April 6, 1981. The jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Mr. Lawrence had been interested in politics all his life. Even as a school-boy he helped pass out campaign literature. He was active in campus politics, and upon graduation from college he was commissioned in the Army and assigned as a social aide at the White House. After completing his Army duty, he was employed on the staff of then-Vice-President Spiro Agnew, as Staff Assistant responsible for correspondence. In 1972 he joined the Committee for the Reelection of the President as Deputy Director of Administration, and was involved in administration, budget, fund raising, telephone and direct mail solicitation, and National Convention activities. Following the election, he was appointed a special assistant to the Assistant Administrator of the General Services Administration in Washington, D.C. Later that year (1973) allegations were made by the Civil Service Commission that Mr. Lawrence and other political appointees had violated federal regulations in attempting to place job applicants referred to them by senators and congressmen. After an administrative law judge threw out the charges against a fellow employee, the Civil Service Commission withdrew all charges against Mr. Lawrence. Meanwhile, however, Mr. Lawrence had resigned from government service and taken a position as Vice President for Ad-

ministration and Director of Community Relations of the American Freedom Train Foundation, Inc. (Answers to Interrogatories, R 22).

In April, 1975, Mr. Lawrence again entered government service as Administrative Assistant to the Administrator of the Social and Economics Statistics Administration, United States Department of Commerce. While his prior employment history was known to the official who appointed him, higher-ups in the Department forced him to resign shortly thereafter because of the CSC's allegations against him at GSA. This resignation was reported by the Washington Star newspaper on May 12, 1975 under the headline "Aide Under Fire Slipped Unnoticed into Another Key Post" (Exhibit A to Affidavit of Moss, R 96). The only references to Mr. Lawrence's relationships with Mr. Agnew and CREEP in the article were factual statements that Mr. Lawrence was

> "A 30-year-old former member of the Nixon campaign and a one-time member of the staff of former Vice President Spiro T. Agnew . . . Lawrence worked for Agnew from 1970-72. He worked for the Nixon campaign in 1972 and joined GSA in early 1973."

This article was a reprint of an article which had appeared in the St. Louis Post-Dispatch three days earlier, written by Robert Adams (Exhibit 4 to Adams' deposition).

In the campaign year of 1976 Mr. Lawrence attended two courses on campaign management and was employed to raise funds and work for conservative candidates and causes in Oklahoma, New York and Kansas City (Answers to Interrogatories, R 24). From September 1 to 14, 1976, Mr. Lawrence was a consultant to the National Conservative Political Action Committee engaged in advising and raising funds to support the candidacy of Orrin G. Hatch

for United States Senator from Utah in the Republican primary election. From September 15, 1976 to October 15, 1976, he was a consultant to the Hatch for Senate Committee, engaged in strategy planning, advertising and media relations, scheduling recommendations and fund raising within and without the State of Utah. He left Utah on October 15, 1976, and from then to election day worked on the senatorial election in New York State (Verified Complaint, R 1).

On October 26, 1976 in Salt Lake City, Utah, in a press conference, the following exchange took place between Mr. Moss and an as-yet unidentified member of the press:

> *Question:* "Mr. Richards said that you allege that Coors and other out-of-state extremists are running Hatch's campaign, or is it just that they have donated 5,000 bucks?"
>
> *Mr. Moss:* "I think they have done both. They put in the money to begin with to get it started and they set the tone of what the campaign would be. There are a lot of advisers. Besides Mr. Coors, there's Ernest Wilkinson and Leon Skousen who are local people that are advising Mr. Hatch, but a young man named Andy Lawrence has been there. Mr. Hatch, in a joint appearance that we had, admitted that Andy Lawrence had been there as a consultant. Well, I know about Andy Lawrence. He was the bag man for Spiro Agnew. And he worked for CREEP. And he was sent out here by these right-wing organizations to assist in this campaign. Now Mr. Hatch said Andy Lawrence is now gone. And I have to believe him. I haven't seen him. But he was here and he did work for a considerable period of time here."

> *Question:* "What do you mean when you say he was a 'bag man' for Spiro Agnew?"
>
> *Mr. Moss:* "(He) picked up the money Spiro would get."

This slanderous allegation was picked up and published in the Salt Lake City Tribune the next day in an article by Douglas L. Parker, which stated:

> "Senator Moss also pointed to a one-time Hatch campaign consultant Andy Lawrence, whom the senator described as a former 'bag man' for Vice President Spiro Agnew who worked for 'CREEP', the Committee to Re-elect the President, in Richard Nixon's 1972 campaign." (Exhibit 1 to Amended Complaint, R1)

Mr. Moss has not defended on the basis of the truth of his statement. He does not contend the statements were true when made, but that he believed the statements were true when made (Defendant's Answers to Interrogatories #6, R 284). From the affidavits and depositions on file, it appears that Mr. Lawrence's name was first mentioned in a press conference by Orrin Hatch on October 13, 1976; that that fact was reported to Moss' Administrative Assistant, Mary Jane Due, on October 18, 1976; that she and Tim Chambliss, a staff person, investigated Mr. Lawrence and found that he had worked for Mr. Agnew and CREEP and was active in fund raising for conservative causes, all of which was true; that she made inquiry regarding Mr. Lawrence of Hal Wolfe, an employee of the National Committee for an Effective Congress, in Washington; that Mr. Wolfe had no personal knowledge of Mr. Lawrence's activities, and consulted one Wesley McCune, an individual who made it his business to keep files on conservative organizations and operatives and sell a newsletter to support himself; that Wesley McCune

was the person who called Lawrence an "Agnew bag man", apparently based on some understanding on McCune's part that Lawrence was part of the "Townhouse" or "Committee of Nine" operation at the time he worked for the Vice President. McCune did not furnish documentation of this allegation to Wolfe, who nonetheless passed the allegation along to Mary Jane Due, who passed it to Senator Moss, who used it to describe G. Andrew Lawrence at the press conference on October 26, 1976. There is no evidence of any further attempts to verify Mr. McCune's "bag man for Spiro Agnew" label from any independent source or to substantiate that Mr. Lawrence ever received any funds on behalf of Spiro Agnew (Affidavits of Moss and Due, R 96 and 103, Deposition of Hal Wolfe, p. 28-43, 52).

There is no contention by Mr. Lawrence that Mr. Moss's actions were based upon ill will, hatred or strong personal dislike of Mr. Lawrence. Rather, Mr. Lawrence contends that Mr. Moss intentionally sought to downgrade him in the eyes of the public to further Moss' own political ambitions, with reckless disregard of the falsity of the allegation.

The District Court granted summary judgment, ruling that as a matter of law Mr. Lawrence was a "public figure" as defined by the pertinent Supreme Court cases; or alternatively, that Mr. Moss's allegation relates to a matter of "public or general concern" under the law of defamation of the State of Utah; that in either case Mr. Lawrence would have to prove the statement was made with actual malice, i.e. with knowledge of its falsity or with reckless disregard for its truth or falsity; and that "there does not exist evidence from which a jury could determine that defendant made this statement of which plaintiff complaints with 'actual malice.' " (Memorandum Decision, R 330).

Mr. Lawrence appealed the District Court decision to the United States Court of Appeals for the Tenth Circuit which reversed the District Court. Recognizing that the decision in *New York Times v. Sullivan,* 376 U.S. 254 (1964), protected the news reporting media against liability to public officials in the absence of actual malice, the Court of Appeals found "plaintiff here was not a public official." The Court then noted that the *New York Times* protection was extended to "public figures" by *Curtis Publishing Co. v. Butts,* and *Associated Press v. Walker,* both decided at 388 U.S. 130 (1967). The Court reviewed the subsequent decisions of this Court establishing the rule that a "public figure" is one who occupies a role of special prominence in the affairs of society or one who thrusts himself into the forefront of public controversy to influence the resolution of issues. It noted that the Court had recently expressly rejected the standard tentatively adopted in *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29 (1971), that the *New York Times* standard should extend to defamatory falsehoods relating to private persons if the statements involve matters of public or general concern.

The Court reviewed the activities of Mr. Lawrence in connection with the Utah campaign:

> "Because the events pertinent to this law suit all occurred in Utah, plaintiff's status in Utah is of prime importance. Before the 1976 election campaign, plaintiff had no Utah connections. He came to Utah in September, 1976 and from then until his October departure, he assisted the Hatch campaign as a private consultant in political polling, strategy, voter targeting volunteer organizations, advertising, writing, fund raising and general campaign management . . . (A 4)
>
> "Plaintiff's activities were in the background

and concerned with administrative organization. He did not thrust himself into public prominence in Utah. So far as the record shows he made no speeches and no radio or television appearances and did not write for public consumption. If he was a public figure, so are all those who participate inconspicuously in political action designed to influence an election.

"Plaintiff is a private individual who claims that he was defamed by another private individual. The First Amendment rights of a private individual can rise no higher than the rights of the news media considered in the *New York Times* line of cases.. *Wolston* says, 443 U.S. at 167-168, that

> 'A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. . . A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times.*'

"The participation of plaintiff in the Hatch campaign may have made him newsworthy, but did not transform him into a public figure. The status of the individual claiming to be defamed is the controlling factor, not the nebulous interest of the public in a matter with which he is inconspicuously involved. See *Littlefield v. Fort Dodge Messenger,* (8th Cir.) 614 F2d 581, 583-584. On the record presented, the plaintiff was not a public figure at the time of the alleged defamatory statement." (A-4, 7 and 8)

The Court of Appeals further determined that even if the alleged defamation involved a matter of public in-

terest, under the law of Utah the plaintiff was entitled to a jury trial on the question of the defendant's improper intent to do harm, knowledge of the falsity, a reckless disregard of the truth or falsity, and remanded the case for trial by jury.

Defendant Frank E. Moss then filed a timely Petition for Writ of Certiorari with this Court.

ARGUMENT

THE QUESTION WHETHER PLAINTIFF WAS A "PUBLIC OFFICIAL" AT THE TIME OF THE ACTS WHICH GAVE RISE TO THE DEFAMATION IS NOT PROPERLY BEFORE THIS COURT.

Petitioner Moss suggests in this Court for the first time that because plaintiff Lawrence was a federal government employee at the time that he worked in Vice President Agnew's office, he is therefore a "public official" under the *New York Times v. Sullivan* rule and must show actual malice. This argument was not raised in the motion for summary judgment to the District Court, was not ruled upon by the District Court, and although the Court of Appeals stated in its opinion "plaintiff here was not a public official", plaintiff reads that as referring to his status at the time of the defamation.

In any event, while the defamatory statement does not specify when the plaintiff is supposed to have picked up illegal money payments on behalf of the then Vice President, it must be inferred that the time frame must be between January 1970 when he started to work for the Vice President's office and January of 1973 when he left his employment with the Committee to Re-elect the President. There is no evidence in the record of any public attention or notoriety directed toward the plaintiff or any media exposure during that period of time, despite the intense public interest in the tax evasion charges which resulted in

the resignation of the Vice President, and in the activities of the Committee to Re-elect the President resulting from the "Watergate" incident.

The reason that there was no publicity is that plaintiff did nothing to warrant publicity during that period of time. He held a rather mundane job in the Vice President's office supervising the activities of the staff which responded to letters directed to the Vice President. At the Committee to Re-elect the President, he was also in charge of internal administration, and though the Committee's activities were examined microscopically by courts, congressional committees and the press, defendant has not pointed out one occasion on which the plaintiff's name was mentioned in the newspapers or over the airwaves.

Of course, the Committee to Re-elect the President was not a governmental agency and plaintiff could not have been a "public official" during his employment there. During his employment on the staff of Vice President Agnew, the record fails to disclose the plaintiff had "substantial responsibility for or control over the conduct of governmental affairs", the test established by *Rosenblatt v. Baer,* 383 U.S. 75 at 85 (1966). See also the comment in footnote 13 to the *Rosenblatt* decision, 383 U.S. at 86.

> "It is suggested that this test might apply to a night watchman accused of stealing state secrets. But a conclusion that the *New York Times* malice standards apply could not be reached merely because a statement defamatory of some person in government employ catches the public's interest; that conclusion would virtually disregard society's interest in protecting reputation. The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the

scrutiny and discussion occasioned by the particular charges in controversy."

While Mr. Moss's slanderous charges may have traced at least part of their origins to the plaintiff's employment in the office of Vice President Agnew, certainly his position as a clerical supervisor in a correspondance section is not such as would not such as would necessarily invite public scrutiny and discussion of the person holding it. Indeed the record fails to disclose any public discussion or interest in Mr. Lawrence during the 1970 to 1973 period of his employment, and he cannot be converted into a "public official" *ex post facto* by slanderous statements uttered four years after the cessation of his employment.

The record is bare of any factual support that the slanderous statement of defendant involved activities of the plaintiff as a "public official" as contemplated by the *New York Times v. Sullivan* line of cases. In any event, the issue was not properly argued to the District Court or the Court of Appeals and is not before this Court for decision.

2. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THE CONTROLLING PRECEDENT IN THIS COURT.

In determining that the plaintiff in this case was not a "public figure" the Court of appeals applied standards established by this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *Time, Inc. v. Firestone,* 424 U.S. 448 (1976), *Hutchinson v. Proxmire,* 443 U.S. 111 (1979), and *Wolston v. Reader's Digest Assn., Inc.,* 443 U.S. 157 (1979).

The Court discovered the common thread running through the cases since *Gertz,* that in order to be a "public figure" one must either occupy a position of such pervasive power and influence that he is deemed a public

figure for all purposes, or he must have thrust himself to the forefront of a particular public controversy in order to influence the resolution of the issues involved. In either event, the "public figure" must invite attention and comment. 418 U.S. at 345.

Prior to the defamation by the defendant, the plaintiff had attained no general reputation in Utah. From the record, the only times that plaintiff's name had appeared in print were in St. Louis, Missouri and in Washington, D.C. in connection with the GSA charges, and in a subsequent congressional investigation which received little or no fanfare. There is no evidence that he was known in the State of Utah outside of the close circle of Hatch supporters and staff members. When his name first came up, even Senator Moss had to send his staff scurrying to farflung sources to determine "who is Andy Lawrence?" He was not, himself, a candidate for elected office, and he did nothing to attract the limelight to himself. On the contrary, he avoided the limelight like a good staff person should do. He was promoting a candidate and it was his function to direct the attention of the voting public to the candidate and not to himself or other supporters. This he had one quite successfully until Senator Moss's derogatory remarks.

The Tenth Circuit Court of Appeals applied the standards enunciated in the recent Supreme Court cases to the undisputed facts in this case and decided that as a matter of law the plaintiff was not a "public figure." In doing so it departed in no way from precedent established by this Court.

3. THERE IS NO CONFLICT BETWEEN THE CIRCUITS ON THIS QUESTION.

Petitioner contends that this Court should issue the writ of certiorari because of a supposed conflict between Cir-

cuit Courts of Appeals, citing *Time, Inc. v. McLaney*, 406 F2d 565 (5th Cir. 1969), *cert. denied* 395 U.S. 922 (1969), *Thompson v. Evening Star Newspaper Co.*, 394 F2d 774 (D.C. Cir. 1968), *cert. denied* 393 U.S. 884 (1968), and *Buchanan v. Associated Press*, 398 F.Supp. 1196 (D.D.C. 1975).

In *Time, Inc. v. McLaney*, decided in 1969, before this Court's decision in *Gertz v. Robert Welch, Inc., supra*, the Fifth Circuit found that

> "We conclude that the constitutional privilege extends to discussions by specific individuals, not associated with any government, if those individuals are involved in matters of important public concern." 406 F2d at 573

While that approach was embraced temporarily by this Court in *Rosenbloom v. Metromedia, Inc., supra*, it was subsequently repudiated by this Court in *Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. at 167-168, quoted by the Tenth Circuit in its opinion in this case:

> "The private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention . . . A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times.*" (A-8)

The *McLaney* case may have been consistent with the state of development of the law in 1969, but it clearly is no longer the law in 1981.

Petitioner also decries the decision of the Tenth Circuit in this case as inconsistent with the decision of the District of Columbia Circuit in *Thompson v. Evening Star Newspaper Co., supra.* The facts of these two cases are en-

tirely different and the decisions are not inconsistent. In *Thompson,* the plaintiff had been a campaign manager for an unsuccessful political candidate. He was in the forefront of the campaign, giving speeches, issuing press releases, and calling attention as much to himself as to his candidate.

> "Appellant, a public relations man in the District of Columbia, as admittedly one of the founders and leaders of the group advocating the Dedmon-McGerr slate and was chairman of the Jesse Dedmon-Patricia McGerr democratic campaign committee . . . Appellant did not confine himself to private discussion of the issues in the primary but took a prominent role in a group appealing for public support." 394 F2d at 775, 776.

The District of Columbia Court contrasts the *Thompson* case with its prior decision in *Afro-American Publishing Co. v. Jaffe,* 366 F2d 649 (D.C. Cir. 1966), an *en banc* decision of the Court, which stated:

> "We conclude that *New York Times,* as written and likely to be extended, does not and will not preclude recovery, even in the absence of malice, by a man whose role is as non-public as plaintiff's, by a man who has not mounted a public rostrum, made an appeal to the public, sought or received public funds, offered a service or product for public use or comment, or organized a boycott or other group activity by members of the public." 366 F2d at 658.

The most recent expression of the law of the District of Columbia Circuit in this regard is *Waldbaum v. Fairchild Publications, Inc.,* 627 F2d 1287 (D.C. Cir. 1980), cert. denied ____ U.S. ____, 101 S.Ct. 266 (1980). In that decision, Judge Tamm exhaustively reviewed all the criteria

established by *Gertz v. Robert Welch, Inc., supra,* and the other Supreme Court decisions in this area. He concluded that

> "Once the Court had defined the controversy, it must analyze the plaintiff's role in it. Trivial or tangential participation is not enough. The language of *Gertz* is clear that plaintiffs must have 'thrust themselves to the forefront' of the controversies so as to become factors in their ultimate resolution. 418 U.S. at 345. They must have achieved a 'special prominence' in the debate. *Id.* at 351. The plaintiff either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution. In undertaking this analysis, a court can look to the plaintiff's past conduct, the extent of press coverage, and the public reaction to his conduct and statements. . .
>
> "Not everyone who participates in activities that affect the public becomes a public figure. Nevertheless, when one assumes a position of great influence within a specific area and uses that influence to advocate and practice controversial policies that substantially affect others, he becomes a public figure for that debate." 627 F2d at 1296, 1300

Without specifically adverting to the criteria, these are the same which were applied by the Tenth Circuit in the instant case. The Court analysed the plaintiff's past conduct, the fact that he was virtually unknown in Utah prior to the defamatory statement,[1] the fact that he had made no public

[1]Cf. Id. 627 F2d at 1295, footnote 22, citing *Gertz,* 418 U.S. at 351-52.

statements of his own attempting to influence the outcome of the debate. There is no conflict between the law of the Tenth Circuit and the law of the District of Columbia Circuit.

4. THE FIRST AMENDMENT PROTECTIONS ENUNCIATED IN THE NEW YORK TIMES V. SULLIVAN LINE OF CASES DO NOT EXTENT TO NON-MEDIA DEFENDANTS.

Plaintiff Lawrence was not a candidate for public office, so it cannot be argued that he was fair game on any subject relating to his fitness for public office. *Garrison v. Louisiana,* 279 U.S. 64 (1964). Defendant was a sitting United States Senator and was a candidate for public office, and as such he had ready access to the media as evidenced by the fact that the alleged defamatory statement in this case took place at a press conference called by him to further his campaign.

The Tenth Circuit Court of Appeals properly found that this was a law suit by one private individual against another private individual. If this Court agrees with its conclusion that Mr. Lawrence was not a "public figure", it is necessary to go no further, although the question whether the "public figure" standard applies to non-media defendants is an open question in this Court:

> "Neither the District Court nor the Court of Appeals considered whether the *New York Times* standard can apply to an individual defendant rather than to a media defendant. At oral argument, counsel for Hutchison stated that he had not conceded that the *New York Times* standard applied. This Court has never decided the question: our conclusion that Hutchison is not a public figure makes it unnecessary to do so in

this case." *Hutchinson v. Proxmire,* 443 U.S. at 1314, footnote 16.

Should this Court determine that Mr. Lawrence was a "public figure" then it would be necessary to go one step further and determine whether this finding made it necessary for the trial court to apply the "actual malice" standard developed in the *New York Times v. Sullivan* line of cases, and to give some guidance to the trial court and to the nation at large as to the nature and extent of the privilege which is being extended to politicians to defame their opponent's supporters. In *Gertz v. Robert Welch, Inc., supra,* this Court explained that the rule developed in the *New York Times v. Sullivan* line of cases as applicable to public figures is a compromise between absolute liability and absolute license on the part of the press, in an effort to give reasonable protection to an individual's reputation while not discouraging full and free discussion. The Court recognizes that in order to insure a free press, there must be some latitude for human error and that absolute liability would have a chilling effect on discussion of public issues by the press.

> "(T)he Court has concluded that the protection of the *New York Times* privilege should be available to publishers and broadcasters of defamatory falsehood concerning public officials and public figures . . . We think that these decisions are correct, but we do not find their holdings justified solely by reference to the interest of the press and broadcast media in immunity from liability. Rather we believe that the *New York Times* rule states an accommodation between this concern and the limited state interest present in the context of libel actions brought by public persons. For the reasons stated below, we conclude that the state interest in com-

> pensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them." 418 U.S. at 343.

This Court went on to explain that one of the principal considerations in relaxing the standards applicable to media defendants is that public figures ordinarily have more access to the press to rebut erroneous statements than do ordinary private citizens. It is this balancing of access which equalizes the equation and makes non-malicious departures from the truth by the press and broadcast media constitutionally palatable. There is no such corresponding balance of access when the defamer is a candidate for public office with thousands of dollars in his war chest, some of which may have been given to him out of public funds for the purpose of buying time in newspapers and on television, and the person defamed is a supporter of an opposing candidate with no funds of his own, and no access to the public treasury or to the campaign war chests of the candidates whom he supports. When a senatorial candidate holds a press conference a week before the election, the story is front-page news. If Mr. Lawrence, who was not even in the State of Utah at the time that the statement was made, held a press conference several days later to rebut the allegations, if any reporters showed up, the story would probably be carried on the last page of the last section behind the obituaries.

The principal has been developed by this Court that publishers and broadcasters will not be liable for falsehoods which were neither deliberate nor reckless, *provided* the person defamed has access to the same or other media to correct the falsehood. It is the *qui pro quo* extracted as a condition of the privilege, because otherwise the media would have the unfettered power to destroy a man's reputation while denying him the communication resources to answer his defamer. There would be no "full

and free debate" because only the voices of the publishers and broadcasters would be heard, and not those who oppose them. In any debate there must be two sides with equivalent opportunity to present their position. The access requirement is designed to prevent media dominance of public debate to the exclusion of conflicting views and corrective statements.

The principle of equal access might even be extended to include competing candidates for the same office. However, unless the Court is to impose some equal time requirement on the media to permit private individuals who are not candidates for office to respond to defamatory remarks about them by candidates, there can be no "balancing of interests." This would be an extreme and unwarranted step, one which is not advocated by the plaintiff in this case.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari to the Tenth Circuit Court of Appeals, and thereby let stand that Court's determination that plaintiff is not a "public figure" and that the case should be remanded to the United States District Court for the District of Utah for trial by jury in accordance with the decision of the Court of Appeals.

Respectfully submitted,

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